Director of Forest, Sarawak & Anor v Tr Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, the occupiers, holders and the claimants of native customary rights (NCR) lands situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–463 OF 2011
MOHD HISHAMUDIN, ABDUL WAHAB PATAIL AND BALIA YUSOF JJCA
12 SEPTEMBER 2013

Land Law — Customary land — Claim to — Whether common law in Sarawak recognised existence of native customary rights to land long before legislation — Whether such rights could only be taken away by clear and unambiguous words in legislation

The respondents in the instant appeal were Ibans who had obtained from the High Court a declaration, inter alia, that they had acquired from their ancestors native customary rights ('NCR') and/or usufructuary rights over 2,712 hectares of primary forest ('the primary forest') in the Kanowit-Ngemah state forest area in Sarawak. The primary forest adjoined 2,802 hectares of cleared and cultivated land over which the appellants conceded the respondents had NCR. In the present appeal against the High Court's decision, the appellants contended that under Sarawak law the appellants could not acquire NCR to the primary forest as there was no statutory recognition of any native custom that enabled NCR to be acquired over uncultivated areas or forests not felled for cultivation but which, nevertheless, had been used by natives to forage for food and other jungle resources. Whilst not disputing the existence of such Ibanese native customs as *pemakai menoa and pulau*, the appellants said such customs were not recognised in any of the orders or proclamations of the Rajahs who once ruled over Sarawak nor in the land ordinances and the Sarawak Land Code as being customs which could give rise to NCR over land. The appellants argued that the law in Sarawak only recognised the native custom of temuda as capable of giving rise to NCR. *Temuda* denoted the native custom of clearing and cultivating an area for occupation; *pulau* denoted the custom of setting aside and maintaining an area under primary forest within a *pemakai menoa* into which the natives would go in search of food, wildlife, medicinal plants, materials for building and other uses, water catchment areas and other forest produce. *Pemakai menoa* denoted the custom of a native community in demarcating its territorial domain comprising both the *temuda* and the *pulau* and which also included old longhouse sites, cemeteries, sacred sites and land reserved under forest cover for

various uses of the longhouse. The instant appeal was concerned with whether the native custom of *pulau* enabled the respondents to claim a valid NCR to the 2,712 hectares of primary forest.

Held, dismissing the appeal with costs:

(1) Since the 2,712 hectares that was claimed as *pulau* adjoined the area to which it was conceded by the appellants that the respondents had NCR due to the fact of occupation by their ancestors in the 1800s, it was safe to conclude that the *pulau* area was likewise established in the 1800s by the respondents' ancestors. There was no reason to hold that the claim over the 2,712 hectares as *pulau* was not bona fide (see paras 32 & 46).

(2) If there was nothing in the laws of Sarawak that recognised the NCR to land, it was equally true there was nothing in clear and unambiguous language that rejected such rights. In the absence of clear and unambiguous words in legislation to repeal or reject pre-existing NCR established under pre-existing native custom, the common law applicable in Sarawak recognised the NCR inherited by the respondents from their ancestors who established their rights in the early 1800s over the 2,712 hectares set aside in their *pemakai menoa* under the native custom of *pulau*; and that right could not be taken away without compensation (see paras 45 & 54).

(3) Recognition of the pre-existing NCR of the respondents' ancestors to the land in their *pemakai menoa* was inherent, for although the Brookes assumed sovereignty in 1841, at no time were the natives conquered and their lands and properties confiscated in war. There was a clear distinction between assumption of sovereignty and title to land. The sovereign right to title within the state was not absolute but subject to unconfiscated pre-existing rights (see para 52).

(4) The definition of law under the Federal Constitution — that it included written law, the common law in so far as it was in operation in the federation or any part thereof, and any custom or usage having the force of law in the federation or any part thereof — meant that the common law applied in the State of Sarawak and it recognised the pre-existence of rights under native laws or customs long before any legislation came to determine how much of those native customary rights had been extinguished (see paras 48–49).

[Bahasa Malaysia summary

Responden-responden dalam rayuan ini merupakan kaum Iban yang telah memperoleh deklarasi dari Mahkamah Tinggi, antara lain, bahawa mereka telah memperoleh hak-hak adat anak watan ('HHAAW') daripada nenek moyang mereka dan/atau hak-hak ke atas 2,712 hektar hutan primer ('hutan primer') di kawasan hutan negeri Kanowit-Ngemah di Sarawak. Hutan primer

itu bersebelahan 2,802 hektar tanah yang telah dibersihkan dan diusahakan yang mana perayu-perayu mengakui responden-responden mempunyai HHAAW. Rayuan ini yang terhadap keputusan Mahkamah Tinggi, perayu-perayu berhujah bahawa di bawah undang-undang Sarawak perayu-perayu tidak boleh memperoleh HHAAW ke atas hutan primer itu kerana tiada pengiktirafan statutori berhubung apa-apa adat anak watan yang membolehkan HHAAW memperoleh kawasan yang tidak diusahakan atau hutan yang tidak ditebangkan untuk penanaman tetapi yang mana, walau bagaimanapun telah digunakan oleh anak-anak watan untuk mencari makanan dan sumber hutan lain. Walaupun tidak mempertikaikan kewujudan adat anak watan kaum Iban seperti pemakai menoa dan pulau, perayu-perayu mengatakan adat-adat tersebut tidak diikhtiraf dalam mana-mana perintah atau pengisytiharan Rajah-Rajah yang pernah memerintah Sarawak atau dalam ordinan-ordinan tanah dan Kanun Tanah Sarawak sebagai adat-adat yang boleh menimbulkan HHAAW ke atas tanah. Perayu-perayu berhujah bahawa undang-undang di Sarawak hanya mengiktiraf adat anak watan temuda sebagai yang boleh menimbulkan HHAAW. Temuda melambangkan adat anak watan yang membersih dan mengusahakan kawasan untuk dididuki; pulau melambangkan adat mengetepikan dan menyenggara kawasan di bawah hutan primer dalam pemakai menoa di mana pribumi akan pergi mencari makanan, hidupan liar, tumbuhan ubatan, bahan-bahan untuk bangunan dan kegunaan lain, kawasan tadahan air dan hasil hutan yang lain. Pemakai menoa melambangkan adat kaum pribumi dalam menentukan wilayah-wilayah domain yang melibatkan kedua-dua temuda dan pulau dan yang juga melibatkan kawasan-kawasan rumah panjang, tanah-tanah perkuburan, tapak-tapak suci dan tanah yang dirizabkan di bawah hutan merangkumi pelbagai kegunaan untuk rumah panjang. Rayuan ini adalah berkenaan sama ada adat anak watan pulau membolehkan responden-responden menuntut HHAAW yang sah ke atas hutan primer seluas 2,712 hektar.

Diputuskan, menolak rayuan dengan kos:

(1) Oleh kerana 2,712 hektar yang telah didakwa sebagai pulau yang bersebelahan kawasan diakui oleh perayu-perayu bahawa responden-responden mempunyai HHAAW akibat daripada fakta pendudukan oleh nenek moyang mereka sekitar tahun 1800-an, ia adalah selamat untuk membuat kesimpulan bahawa kawasan pulau itu juga diwujudkan sekitar tahun 1800-an oleh nenek moyang responden-responden. Tiada sebab untuk memutuskan bahawa tuntutan ke atas 2,712 hektar itu sebagai pulau bukanlah secara bona fide (lihat perenggan 32 & 46).

(2) Jika tiada dalam undang-undang Sarawak yang mengiktiraf HHAAW ke atas tanah, ia adalah sama sebenarnya bahawa tiada apa-apa dalam bahasa yang jelas dan tidak taksa yang menolak hak-hak tersebut. Dengan ketiadaan perkataan-perkataan yang jelas dan tak taksa dalam

perundangan untuk memansuh atau menolak HHAAW yang sedia ada yang diwujudkan di bawah adat anak watan yang sedia ada, *common law* yang terpakai di Sarawak mengiktiraf HHAAW yang diwarisi oleh responden-responden daripada nenek moyang mereka yang telah mewujudkan hak-hak mereka sekitar awal tahun 1800-an ke atas 2,712 hektar yang diketepikan dalam pemakai menoa mereka di bawah adat anak watan berhubung pulau; dan hak tersebut tidak boleh dilucutkan tanpa pampasan (lihat perenggan 45 & 54).

(3) Pengiktirafan HHAAW yang sedia ada kepada nenek moyang responden-responden ke atas tanah dalam pemakai menoa mereka adalah diwarisi, kerana meskipun keluarga Brooks mengandaikan kedaulatan pada tahun 1841, tiada pada bila-bila masa pun anak watan itu ditawan dan tanah-tanah dan hartanah-hartanah mereka dirampas semasa peperangan. Terdapat perbezaan ketara antara andaian kedaulatan dan hak milik tanah. Hak kedaulatan kepada hak milik dalam negeri tidak mutlak tetapi tertakluk kepada hak-hak sedia ada yang tidak dirampas (lihat perenggan 52).

(4) Definisi undang-undang di bawah Perlembagaan Persekutuan — bahawa ia termasuklah undang-undang bertulis, *common law* setakat mana ia beroperasi dalam Persekutuan atau mana-mana bahagian, dan mana-mana adat atau penggunaan yang mempunyai kuasa undang-undang dalam Persekutuan atau mana-mana bahagian — bermaksud bahawa *common law* yang terpakai di negeri Sarawak dan ia mengiktiraf hak-hak sedia ada di bawah undang-undang anak watan atau adat sebelum mana-mana perundangan wujud untuk menentukan banyak mana hak-hak adat anak watan telah terhapus (lihat perenggan 48–49).]

Notes

For cases on claim of customary land, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3205–3210.

Cases referred to

Abang v Saripah [1970] 1 MLJ 164; [1969] 1 LNS 2 (refd)

Abas ak Naun & 5 Ors v Jangkar Plantation Sdn Bhd & 2 Ors [2009] 1 LNS 1105, HC (refd)

Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204; [2010] 1 LNS 114, HC (consd)

Ago Siam v Manggi Dato [2002] 1 LNS 46, HC (refd)

Ara binte Aman & Ors v Superintendent of Lands and Mines, 2nd Division [1975] 1 MLJ 208; [1973] 1 LNS 5 (refd)

Balare Jabu & Ors v Merawa Sdn Bhd & Ors [2008] 1 LNS 879, HC (refd)

Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Survey Kuching Division & Ors [2012] 3 MLJ 202; [2012] 1 LNS 260, CA (refd)

Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Survey Kuching Division & Ors [2008] 4 MLJ 415; [2008] 5 CLJ 606, HC (consd)
Galau & Ors v Penghulu Imang & Ors [1967] 1 MLJ 192; [1966] 1 LNS 50 (refd)
Husli bin Mok & Ors v Probate Officer, Miri [1996] 5 MLJ 420 ; [1995] 1 LNS 89, HC (refd)
Injing v Tuah & Anor [1971] 1 MLJ 115; [1970] 1 LNS 39 (refd)
Jamboi ak Linggoh & Ors v Wawasan Sedar Sdn Bhd & Ors [2013] 8 MLJ 737 ; [2012] 1 LNS 580, HC (refd)
James Jagah Nyadak & 12 Ors v Usaha Jasamaju Sdn Bhd & 8 Ors [2009] 1 LNS 1094, HC (refd)
Jawi Ak Landu v Sunny Inspiration Sdn Bhd and Anor [2007] 8 MLJ 38 ; [2007] 9 CLJ 1, HC (refd)
Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427 ; [1990] 2 CLJ 625, HC (refd)
Laga v Uging & Anor [1966] 1 MLJ 27; [1965] 1 LNS 77 (refd)
Luking Uding & Ors v Superintendent of Lands and Survey Kota Samarahan Division & Ors [2011] 7 CLJ 342, HC (refd)
Mabo and Others v Queensland (No 2) (1992) 175 CLR 1; [1992] HCA 23, HC (refd)
Masa anak Nangkai and Ors v Lembaga Pembangunan dan Lindungan and Ors [2011] MLJU 197; [2011] 1 LNS 145, HC (refd)
Mohamad Rambli bin Kawi v Superintendant of Lands Kuching & Anor [2010] 8 MLJ 441; [2010] 1 LNS 115, HC (refd)
New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, HC (refd)
Nicholas Mujah Ason & Ors v Hock Tong Hin Sawmill Co Bhd & Ors [2012] 1 CLJ 749, HC (refd)
Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241; [2001] 7 CLJ 769, HC (refd)
Nor ak Nyawai & Ors (suing for and on behalf of themselves and all other occupiers, holders and claimants of native customary right land (NCR) at Sungai Sekabai, Sungai Tajem, Tatau, Bintulu, Sarawak) v Tatau Land Sdn Bhd & Ors [2012] 6 MLJ 830 ; [2012] 8 CLJ 956, HC (refd)
Novelpac-Puncakdana Plantation Sdn Bhd v Anchih anak Buap & Ors [2000] 4 MLJ 524 ; [2000] 1 LNS 75, HC (refd)
Numpang Suntai & Ors v Quality Concrete Holdings Berhad & Ors [2012] 1 LNS 752, HC (refd)
Nyalong v The Superintendent of Lands and Surveys 2nd Division, Simanggang [1967] 2 MLJ 249 ; [1967] 1 LNS 116 (refd)
Salleh bin Kilong v Superintendent of Lands and Surveys & Anor [2000] MLJU 749; [2000] 8 CLJ 538, HC (refd)
Siau Jun Phiang v Awg Amir bin Awg Awin & Ors [1999] 1 LNS 18, HC (refd)
Sop Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors [2004] 4 MLJ 180; [2004] 1 LNS 331, HC (refd)

Subing Jamit @ Langan v The Director of Lands & Surveys Sarawak & Anor [2001] 1 LNS 22, HC (refd)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (distd)

TR Lampoh ak Dana & Ors v Government of Sarawak [2005] 6 MLJ 371; [2004] 1 LNS 717, HC (refd)

Usaha Wawasan Sdn Bhd v Njop ak Kanyan & Ors [2012] 3 MLJ 389; [2011] 1 LNS 1644, HC (refd)

Legislation referred to

Adat Iban Order 1993

Native Customary Laws Ordinance (Cap 51) ss 3, 5

Native Courts Ordinance 1992

Federal Constitution arts 74, 95B, 121, 160(2), Ninth Schedule, List II, State List, List IIA, Supplement to State List for States of Sabah and Sarawak, Item 13

Sarawak Land Code (Cap 81) s 5(2)

JC Fong (Mc Willyn Joik with him) (Senior Legal Counsel, State Attorney-General's Chambers) for the appellants.

Baru Bian (Siah Sy Gen (Simon) and Chua Kuan Ching with him) (Baru Bian Advocates) for the respondents.

Wee Wai Kiat watching brief for Kanowit Timber Sdn Bhd.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The Director of Forest, Sarawak and the State Government of Sarawak ('the appellants') appealed to this court against the decision of the High Court delivered on 27 May 2011 in Suit No 21–2 of 2009 filed by the respondents in the High Court at Sibu.

[2] The first appellant is the principal officer in charge of forestry in the State of Sarawak which is governed by the State Government of Sarawak, the second appellant.

[3] The respondents are Iban who claim to have inherited rights from their ancestors who acquired native customary rights over lands situated in Kanowit-Ngemah State Land Forest in Kanowit, Sarawak ('the licensed area'), as shown in the map marked 'M' attached to the statement of claim.

[4] In the above-mentioned Suit No 21–2 of 2009, from which this appeal arises, the respondents, as the plaintiffs, had obtained certain declarations from the High Court, including a declaration that the respondents have native

customary rights and/or usufructuary rights over the disputed area.

THE SUBJECT OF THE APPEAL

[5] The appellants had tendered into evidence before the High Court a composite of aerial photographs taken in 1951 and superimposed upon a map of the area. It showed the land in the area claimed by the respondents under native customary rights measures 5639 hectares comprising 2802 hectares of cleared and cultivated land area and approximately 2712 hectares of land under primary forest. This is not disputed.

[6] The learned state legal counsel of the State of Sarawak, Datuk JC Fong, for the appellants, conceded that the respondents had acquired native customary rights over the 2802 hectares of cleared land area. The appeal is concerned only with the adjoining 2712 hectares under primary forest claimed by the respondents to have been set aside in their *pemakai menoa* under the Iban native custom of *pulau*, a term for land maintained under Iban native custom under primary forest from which they derive food, medicines, wildlife and other forest produce.

[7] The appellants had framed the issue in this appeal by predicating it in three ways as follows:

(a) whether the custom of 'pemakai menoa' and 'pulau' falls within:

(i) the definition of 'law' under art 160(2) of the Federal Constitution; or

(b) whether the term 'native customary law' as defined in the Land Code of Sarawak and the Native Courts Ordinance (Cap 43 1958 Edition of Laws Sarawak) which came into force on 1 September 1955 recognises the said customs of 'pemakai menoa' and 'pulau' in relation to the creation or acquisition of 'rights over land' in Sarawak;
alternatively or precisely;

(c) is native customary rights over land confined to 'temuda' land?
or, in the further alternative; and

(d) has the custom of 'Pemakai Menoa' been given effect to by the law of Sarawak?.

[8] Put more directly in the submissions, the appellants do not dispute the existence of the native customs of 'pemakai menoa' and 'pulau'. It was however contended for the appellants that:

(a) the law in Sarawak only recognises 'temuda'; and

(b) 'pemakai menoa' and 'pulau' did not appear in any of the orders of the Rajahs, the Land Ordinances and the Sarawak Land Code as native custom that could give rise to native customary rights to land.

PEMAKAI MENOA, TEMUDA AND PULAU

[9] The terms 'pemakai menoa' (sometimes spelt as 'pemakai menua'), 'temuda' and 'pulau' are terms in the Iban Language denoting use of territory demarcated under their custom.

[10] Before the High Courts, the term 'pemakai menoa' appeared in *Bisi ak Jinggot @ Hilarion Bisi ak Jenggot v Superintendent of Lands and Survey Kuching Division & Ors* [2008] 4 MLJ 415; [2008] 5 CLJ 606; *Bisi ak Jinggot (@) Hilarion Bisi ak Jenggut v Superintendent of Lands and Survey Kuching Division & Ors* [2008] 1 LNS 245; *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204; [2010] 1 LNS 114; *Mohamad Rambli bin Kawi v Superintendent of Lands Kuching Division & Anor* [2010] 8 MLJ 441; [2010] 1 LNS 115: *Luking Uding & Ors v Superintendent of Lands and Survey Kota Samarahan Division & Ors* [2011] 7 CLJ 342; [2011] 1 LNS 143; *Nicholas Mujah Ason & Ors v Hock Tong Hin Sawmill Co Sdn Bhd & Ors* [2012] 1 CLJ 749; [2011] 1 LNS 322; *Numpang Suntai & Ors v Quality Concrete Holdings Berhad & Ors* [2012] 1 LNS 752; *Jamboi ak Linggoh & Ors v Wawasan Sedar Sdn Bhd & Ors* [2013] 8 MLJ 737; [2012] 1 LNS 580 and *Nor ak Nyawai & Ors (suing for and on behalf of themselves and all other occupiers, holders and claimants of native customary right land (NCR) at Sungai Sekabai, Sungai Tajem, Tatau, Bintulu, Sarawak) v Tatau Land Sdn Bhd & Ors* [2012] 6 MLJ 830; [2012] 8 CLJ 956 to denote the native custom.

[11] Spelt also as 'pemakai menua' it appeared in *Novelpac-Puncakdana Plantation Sdn Bhd v Anchih ak Buap & Ors* [2000] 4 MLJ 524; [2000] 1 LNS 75; *Subing Jamit @ Langan v The Director of Lands and Surveys Sarawak & Anor* [2001] 1 LNS 22; *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 7 CLJ 769; *Agi Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors*; *Luking Uding & Ors v Superintendent of Lands and Survey Kota Samarahan Division & Ors*; *Nicholas Mujah Ason & Ors v Hock Tong Hin Sawmill Co Sdn Bhd*; *Jamboi Linggoh & Ors v Wawasan Sedar Sdn Bhd & Ors* similarly to denote the native custom.

[12] The term 'temuda' appeared in the High Courts in the above cases as well as in *Usaha Wawasan Sdn Bhd v Njop ak Kanyan & Ors* [2012] 3 MLJ 389; [2011] 1 LNS 1644; *James Jagah Nyadak & Ors v Usaha Jasamaju Sdn Bhd & Ors* [2009] 1 LNS 1094; *Abas ak Naun & 5 Ors v Jangkar Plantation Sdn Bhd & Ors* [2009] 1 LNS 1105: *Balare Jabu & Ors v Merawa Sdn Bhd & Ors* [2008]

1 LNS 879; *Jawi Ak Landu v Sunny Inspiration Sdn Bhd & Anor* [2007] 8 MLJ 38; [2007] 9 CLJ 1; *TR Lampoh ak Dana & Ors v Government of Sarawak* [2004] 1 LNS 717; *Sop Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors* [2004] 4 MLJ 180; [2004] 1 LNS 331; *Ago Siam v Manggi Dato* [2002] 1 LNS 46; *Salleh bin Kilong v Superintendent of Lands and Surveys & Anor* [2000] MLJU 749; [2000] 8 CLJ 538; *Siau Jun Phiang v Awg Amir bin Awg Awin & Ors* [1999] 1 LNS 18; *Husli bin Mok & Ors v Probate Officer, Miri* [1996] 5 MLJ 420; [1995] 1 LNS 89; *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427; [1990] 2 CLJ 625; *Ara binte Aman & Ors v Superintendent of Lands and Mines, 2nd Division* [1975] 1 MLJ 208; [1973] 1 LNS 5; *Nyalong v The Superintendent of Lands and Surveys 2nd Division, Simanggang* [1967] 2 MLJ 249; [1967] 1 LNS 116 and *Laga v Uging & Anor* [1966] 1 MLJ 27; [1965] 1 LNS 77 similarly.

[13] The term 'temuda' similarly appeared in the Court of Appeal in *Bisi Jinggot @ Hilarion Bisi Jenggut v Superintendent of Lands and Survey Kuching Division & Ors* [2012] 3 MLJ 202; [2012] 1 LNS 260 (CA) and *Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 (CA), and in the Native Court of Appeal in *Injing v Tuah & Anor* [1971] 1 MLJ 115; [1970] 1 LNS 39; *Abang v Saripah* [1970] 1 MLJ 164; [1969] 1 LNS 2 and *Galau & Ors v Penghulu Imang & Ors* [1967] 1 MLJ 192; [1966] 1 LNS 50.

[14] The terms 'pulau' and 'pulau galau' appeared also in the High Courts in *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769; *Nicholas Mujah Ason & Ors v Hock Tong Hin Sawmill Co Sdn Bhd & Ors*; *Luking Uding & Ors v Superintendent of Lands and Survey Kota Samarahan Division & Ors*; *Agi Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors*; *Numpang Suntai & Ors v Quality Concrete Holdings Berhad & Ors*; *Masa anak Nangkai & Ors v Lembaga Pembangunan dan Lindungan & Ors* [2011] MLJU 197; [2011] 1 LNS 145.

[15] The existence of the native custom of *pemakai menoa*, *temuda* and *pulau* were not the subject of dispute.

[16] But to address the question whether the law in Sarawak only recognises *temuda* requires a clear understanding of the meaning of these terms.

[17] In *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204; [2010] 1 LNS 114; [2010] 1 LNS 114, David Wong Dak Wah, J (as he then was) accepted the unrebutted explanation of a witness in that case, Empeni Lang ('PW9'), a retired civil servant who had served in the

government service as a Sarawak Administrative Officer, Resident and Chief Registrar of the Native Court, on these terms and how the rights were created as follows:

Q: You explained Pemakai Menua as territorial resource and then you explained Temuda rights as right to the NCR land. Can you be more specific of the difference between Pemakai Menua and the Temuda rights?

A: Pemakai Menua is the geographical extent of the territory of each longhouse. Within this specific area, there exist NCR rights to land like Temuda that is farming land, cultivation such as rubber garden, fruit trees, burial grounds, longhouse sites and ex-longhouse ie, Tembawai forest islet or pulau inclusive of Pulau Galau. Pulau Mali that is all reserve or all forest stands created under custom The purpose of this pulau is to be a source of trees for domestic use, such as timber, rottan, material for padi bins (made of the tree barks, fashioned in a circular manner to contain padi alter harvest), and material for making boats. This Pemakai Menua is inclusive of forest are also sources of collection of jungle produce such as fern, bamboo shoots and other edible produce. This Pemakai Menua defines the jurisdiction of each Tuai Rumah and it is this jurisdiction that is the extent of the local jurisdiction of Tuai Rumah as defined or implied under Section 7 of the Native Court Ordinance 1992. Without the concept of Pemakai Menua, there would be no clear definition and extent of the local jurisdiction of the Tuai Rumah as the presiding officer of the headman Court in the Native Court system.

Q: What about Temuda?

A: Temuda is held under NCR It is created under Section 5(2) of the Land Code ie, it must be created before 1st January 1958 by way of clearing and occupation, by way of planting and cultivation or under Section 10 of the Land Code, that is last time it was approved by the District Officer but now approve by the Superintendent of Lands & Surveys and by way of communal reserve, approve by the minister. This NCR land was created by way of felling of the primary forest by the original workers of our ancestors and the rights of use is transferred to subsequent generation as its name suggest, it is an untitled land which could be lost in the manners that I had mentioned earlier ie, non-user, unauthorized migration, abandonment and extinguishment It is a common practice under the custom of shifting cultivation for this Temuda land to remain idle in accordance of fallow system use to maximize land fertility and enhancing maximum use. The length of this idle period within the fallow system is contingent on the nature of the fertility of the land. The more fertile the land is, the shorter will be the idle period. The less fertile the land is, the longer will be the idle period.

Q: You just described the creation of Temuda under the civil laws. Does the Iban's custom and tradition allow the creation of Temuda?

A: Yes, in fact the creation of Temuda or NCR land are created under custom, that is it was created by our ancestors prior to 1st January 1958. That is

why in the land code 1958 (Cap 81) Section 5 (2) (f), says any other lawful means. The definition of customary law is custom or body of custom to which the law of Sarawak gives effect (Section 2 of the Native Court Ordinance 1992).

Q: Are you aware if there is or are instances of longhouses sharing the same Pemakai Menua?

A: Yes, it is quite common. This happened when the first pioneer longhouses started with one longhouse. Subsequently, because of the increase of the number of 'bilik' or 'bilik' families it is quite natural and normal for the people to build a new longhouse or additional longhouses. Hence from the original one longhouse, they may build more longhouses. As I said earlier, the Pemakai Menua or the extent of Pemakai Menua is determined by the ritual ceremony of Panggol Menua. The original longhouse and the consequent longhouses will therefore share the same territorial resource area.

[18] We found assistance also, as did Hamid Sultan Abu Backer, J (as he then was) in *Bisi ak Jinggot v Superintendent of Lands and Surveys Kuching Division & Ors* [2008] 4 MLJ 415; [2008] 5 CLJ 606 from the article by the learned writer Dr Dimbab Ngidang of the Institute of South East Asian Studies in Universiti Malaysia Sarawak, entitled 'Transformation of Iban Land Use System In Post Independence Sarawak' published in 2003 Vol 34 Borneo Research Bulletin. We reproduce that part as pertains to the understanding of the terms 'pemakai menoa' and 'pulau':

> The pemakai menoa, both physically and as a concept, is central to Iban resource management. It is the hub of Iban resource tenure and, in a physical sense, constitutes a collective pool of natural resources, such as native farmland, fruit orchards or groves, primary and secondary forests and forest products (ie, timber and wild vegetables, edible ferns and palm shoots, rattan, herbs and/or medicinal plants, fruit trees and bamboo); river and streams that run through a territory, and water catchments (Ngidang 2000, Lembat 1994, Richards 1961). Thus, pemakai menoa is the territorial domain of a longhouse community where customary rights to land and other natural resources were acquired by pioneering ancestors (Ngidang 2000).
>
> …
>
> Rights to cultivate temuda land initially belong to, and then are inherited from, the person who first felled the virgin forest. In the past, when resources were still abundant, any member of a longhouse had free access to resources in a temuda. For instance, he could take firewood and bamboo; gather wild fruits and vegetables, etc. without consulting the bilik family having cultivation rights over the land.
>
> In addition, a longhouse community has its own forest reserve or pulau. The term pulau refers to an area of primary forest within a pemakai menoa. Pulau can be collectively owned under a common property regime and managed by a longhouse community, or individually owned. An individual creates the latter adjacent to the

cultivated plot of land he first cleared at the time when a longhouse community established pemakai menoa. This reserve is called pulau umai and acts to preserve certain natural resources for future use. These resources can be rattan, tapang trees, fruit trees, timber and so on. Rights of access to these resources belong to those who first cleared the land and to their descendants thereafter. In the case of community-owned pulau, there are four types of communal forest reserves set aside for hunting, gathering building materials and water catchments within a pemakai menoa.

[19] We note that the meaning of the terms 'pemakai menoa', 'temuda' and 'pulau' in native custom were not disputed in *Superintendent of Lands & Surveys, Bintulu v Nor ak Nyawai & Ors and another appeal*:

We also note that there is no dispute on the meanings of the relevant Iban terminologies as recorded by the learned judge. Thus, 'pemakai menoa' is a term given to an area of land selected by pioneers of a longhouse community who are usually related to each other for the construction of 'a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the families'. And the longhouse will 'just expand to with new families'. And it is within the 'pemakai menoa' that the longhouse community will establish 'temuda' which is an area of land accessible for farming and 'pulau' or 'pulau galau' which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce. The other Iban terms are 'tembawai' for old longhouse site; 'tanah umai' for cultivated land within 'pemakai menoa' and 'pendam' is cemetery. However 'pemakai menoa' has its boundary usually based on streams, watersheds, ridges and permanent landmarks, separating it from another longhouse community.

[20] In an article published in South Asian Studies, Vol 43, No 1 of June 2005 bearing the title 'Deconstruction and Reconstruction of Native Customary Land Tenure in Sarawak', Dr Dimbab Ngidang wrote:

In Iban, the concept of territorial domain is called pemakai menoa, where customary rights were created by pioneering ancestors [Ngidang 2000a]. This is embodied in Iban customary law that has long been in existence. Richards [1961], in his report on Land Law and Adat Systems in Sarawak, wrote that 'the family groups (bilik) join together to make a longhouse which, with the surrounding contiguous territory, make up the menoa. It includes besides farms and gardens, the water that runs through it and the forest round about it to the extent of half a day's journey'. Lembat [1994] explained that pemakai menoa, according to the Iban adat system, is an area of land held by a distinct longhouse or village community, that includes farms, gardens, fruit groves, possibly a cemetery, water and forest within a defined boundary (garis menoa) normally following streams, watersheds, ridges and permanent landmarks. A pemakai menoa also includes cultivated farmland (tanah umai), old longhouse sites (tembawai), cemeteries (pendam) and forest areas (pulau galau). The claim by natives over a territory is best stated in Mundy [1848: 210], where Brooke acknowledged that the livelihood, culture and survival of natives surely centered on:

> The fruit trees about the kampong, and as far as the jungle round, are private property, and all other trees which are in any way useful, such as bamboo, various kinds for making bark- cloth, the bitter kony … and many others. Land, likewise, is individual property, and descends from father to son, so likewise, is the fishing of particular rivers, and indeed most other things … (as quoted in Hong [1987: 39]'.

[21] From the foregoing, we conclude that under native custom, the term 'pemakai menoa' extends not only to cultivated land (*tanah umai*), but also to fallow land (*temuda*), old longhouse sites (*tembawai*), cemeteries and sacred sites and land reserved under forest cover for various uses of the longhouse (*pulau*).

[22] 'Richards' is AJN Richards, an administrative officer who served in Sarawak from 1938 and retired as resident in 1964. His extensive collection of writings, photographs and books including his published works on the Iban are in the *AJN Richards Collection* in the University Malaysia Sarawak Library and the Tun Jugah Foundation Library. 'Lembat' is *Gerunsin Lembat* who presented a paper 'Native Customary Land and Adat' in 1994. 'Mundy' is Captain George Rodney Mundy of the frigate HMS Iris deployed to Borneo and assisted Sir James Brooke on his ship the 'Royalist' to conduct operations against pirates in Sarawak, and secured Labuan for the British in 1846. After other assignments in other parts of the then British Empire, he rose to be the Admiral of the Fleet and Commander-in-Chief, in Portsmouth, United Kingdom.

[23] AJN Richards as far back as 1961 recognised 'Pemakai temuda' to include forest area reserved as 'pulau' or 'pulau galau'. We note here too as in some of the cases, the term 'temuda' and 'menoa' is sometimes interchanged.

[24] Dr Jayl Langub, an anthropologist, a senior research fellow at the Institute of East Asian Studies, University Malaysia Sarawak, and a former Secretary of Majlis Adat Istiadat Sarawak, submitted to the Malaysian Human Rights Commission National Inquiry on Native Customary Rights Land as follows:

> The *adat* is the guiding principle with regard to rights to establishing a village territorial domain, individual acquisition of land for cultivation, boundary and inheritance. The territorial domain held by a distinct longhouse is known in Iban as *pemakai menua* and includes farms, gardens, old longhouse sites, fruit groves, cemetery, water and forest within a defined boundary (*garis menua*). Boundary is an important point of reference when a dispute arises between groups or individuals. The process of creating *pemakai menua* involves the ceremony of *panggul menua*. When the Brookes established a government in Sarawak in 1841 this system of land tenure had long been in existence. During the one hundred years of Brooke rule this system of land tenure was maintained and practiced in the Native Courts.

> *Tanah umai* include all lands that are cultivated as farms, gardens, and fruit groves. It also includes land left fallow, widely known in Sarawak as *temuda* (see below). As a general rule the household within the village that first felled the forest secures rights over specific pieces of land. These rights are heritable, passing down from one generation to the next of household members. It is on specific plots of land within the *pemakai menua* that households make their rice farm or cash crop gardens. Individual plots are marked by natural boundaries (*garis umai*) such as streams, watersheds, ridges and permanent landmarks.
>
> *Temuda* refers to farming land left fallow on which there are secondary growths …

[25] It appears the expert Empeni Lang used the term 'temuda' to denote farming land, while Dr Jayl Langub used the term 'tanah umai' for farming land and 'temuda' for farming land left to fallow. Leaving land to fallow is an agricultural practice of allowing farming land to rest for a number of years to recover fertility, and to recover from pest and disease before recultivation. The common denominator of both descriptions is that the words refer to cultivated land.

[26] The above experts AJN Richards and Dr Dimbab Ngidang wrote, and Empeni Lang testified, that *pemakai menoa* include *pulau*.

[27] The learned state legal counsel had candidly acknowledged that even though the term 'Pemakai Menua' is not mentioned in Adat Iban 1993, made under ss 3 and 5 of the Native Customary Laws Ordinance(Cap 51), it does not mean such practice did not exist.

[28] For the purposes of clarity, we therefore use the term 'temuda' to denote the native custom cultivating an area, and 'pulau' to denote the native custom of setting aside and maintaining an area under primary forest from which they derive food, medicines, wildlife and other forest produce. While 'pemakai menua' is used to denote the native custom of demarcating an area by a native community, comprising both cultivated area and area set aside.

[29] Therefore, since the appeal concerns only the area of 2712 hectares under primary forest, this appeal is solely concerned with whether the native custom of 'pulau' constitutes a valid native customary right to land.

BASIS OF THE RESPONDENTS' CLAIM

[30] The basis of the respondents' claim is that they inherited the rights to the area claimed from their ancestors who came into the area in the 1800s.

[31] Of the total area of 5639 hectares that they claimed, the appellants

conceded that the respondents have a valid native customary right to an area of 2802 hectares comprising cleared and cultivated land.

[32] Since the area of 2712 hectares (the subject of this appeal) that is claimed as *pulau* adjoins the area where it is conceded that they have native customary rights to, from occupation by their ancestors in the 1800s, it is safe to conclude that the *pulau* area was likewise established in the 1800s by their ancestors.

[33] The question before this court therefore narrows down to whether pulau established in the 1800s supports a valid native customary right to land after 1958.

NATIVE CUSTOMARY RIGHTS TO LAND

[34] Before us, the learned state legal counsel set out the following materials that form the basis of his submissions. We take liberty to rearrange them into a chronological order:

(a) the Rajah's Order 1875:
'Whereas it is a common practice among the native community to make large clearings of old jungle and afterwards abandon them, I hereby direct that should any clearance of the kind be made in future, and the persons who cleared the ground allow the same to go uncared for, they will lose all claim or title to such lands; and should anyone who desirous of making gardens thereon, they will be permitted to become squatters; and notice is hereby given that should the original clearers try by any means to molest any such squatter they will render themselves liable to be fined at the rate of $10 (10 dollars) per hundred fathoms square for all the land they may have cleared, they having destroyed useful jungle produce such as firewood, rattan & etc., for no purpose';

(b) the Fruit Trees Order 1899:
'… unless they can clearly prove such trees were planted and cultivated by them; nor may any rattan land be claimed or sold, unless such lands were planted by those claiming or selling them';

(c) s 22(1) of the Land Order 1920:
'Natives may occupy land free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that, where possible, claims to fruit groves and farming lands shall be registered. Records of such claims shall be kept by all Native Headman and also in the Land Office in each district';

(d) s 2 of the Supplementary to Land Order No VIII, 1920: '2.(1) Native

land reserves shall be made in suitable situations and these shall be divided into lots of three acres and any native born subject of His Highness the Rajah shall be permitted to occupy one such lot free of all charges (excepting fees for demarcation) provided that no person not being a native of the Country shall occupy land in such reserves and further that no one person shall occupy more than one lot at one and the same time';

(e) notes for the Guidance of Officers in Interpreting Order No L-4 1928 (ie Laws of Sarawak Ordinance 1928):
'Thus it is clear that the custom of head hunting could never be approved by the Courts …'
And the four tests provided on whether the custom could be upheld as being part of the laws of Sarawak under the said Order L-4 1928:

(i) is the custom general and inveterate, or is it confined to a small number of people and of comparative origin?

(ii) is it reasonable?

(iii) does the custom offend against morality? and

(iv) does the custom offend against public policy?

(f) s 66 of the Land Settlement Ordinance (Rajah Order L-7 of 1933)
'Native customary rights shall be held to be

(a) land planted with fruit trees, when the number of fruit trees amounts to twenty and upwards to each acre;

(b) land that is in continuous occupation or has been cultivated or built on within three years;

(c) burial grounds or shrines;

(d) usual rights of way for men and animals from rivers, roads, or houses to any or all of the above.

(g) Secretariat Circular No 12/1933:

(i) The right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle. This right must be exercised in accordance with a cycle compatible with the presentation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle is in your eyes, not a matter for rule of thumb but for expert native opinion.

(h) Secretariat Circular No 12/1939 dated 21 November 1939 by the Chief Secretary:

3. All natives of Sarawak follow Indonesian *adat* to a greater or lesser degree and that *adat*, as regards the customary tenure of land, is briefly as follows:

(i) the right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle. This right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community … cycle is, in their eyes, not a matter for rule of thumb but for expert native opinion;

(ii) where not inconsistent with the above, the existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary right of user;

(iii) individual ownership is limited by the customary right of the community to say in the matter of disposal to anyone outside the community; and

(iv) no community or individual may hold up land in excess of requirements and, the extreme case, removal to another district, automatically extinguishes all rights of user.

(i) *Tusun Tunggu* (Sea Dayak/lban Codes of Fines):

'Theoretically all untitled land whether jungle or cleared for padi farming (Temuda) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farms confers on them restricted rights of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes 'temuda'. It is a recognized custom that 'temuda' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance.

In former days there were no restrictions on anyone felling jungle provided that they did not destroy valuable commercial trees such as gutta, jelutong and engkabang. But it is not so now. Since the introduction of the Forest and Erosion Ordinance no one is allowed to fell jungle without permission from the proper authority.

No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they did so, and they may be prosecuted in view of the fact that selling of untitled land is prevalent in this division, and Dayaks seem to forget this custom.

There are no other ways in which Dayaks can part with possession untitled land other than by gift or on death. When a Dayak abandons his land 'temuda' and moves to another district he losses on his rights to it. The land than has been farmed by him reverts to the Crown (as legally it

is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the right.
This was made clear by the Rajah's Order dated 10th August 1899 Land Tenure Act, which states that, 'any Dayak removing from a river on district may not claim, sell or transfer any farming ground in such river or district nor may he prevent others farming thereon unless he holds such land under grant'.

(j) s 5(2) of the Land Code 1958 (Sarawak Cap 81):
'The methods by which native customary rights may be created are:

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine; or

(e) the use of land of any class for rights of way:

Provided that:

(i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

(ii) the question whether any such right has been created or has been lost or terminated shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

(k) AJN Richards in 'Report on Land Law & Adat' published in 1961:
'Customs means an 'established usage having the force of law, which it is unjust to deny or regulate to an inferior status so long as it can be shown to have stood the test of time without interfering with others who do not subscribe to it'.

…

'As was pointed out by Mooney, as Crown Counsel and Hickling, the law does not, in fact, gives effect to any customs whatsoever except the codified law of delicts';

(l) article 160(2) of the Federal Constitution:
'Law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof'; and

(m) AF Porter: The Development of Land Administration In Sarawak from the Rule of Rajah Brooke to the Present Time (1841–1967), published 1967:

'At the time of James Brooke's arrival in Sarawak there had for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian adat'. Within Sarawak the term 'adat', without qualification is used to describe this body of customary rules or laws; the English equivalent is usually 'native customary law' or native customary rights.'.

[35] We would also add to the above the following:

(a) the Fruit Trees Order 1899 ss 1–2:

'Such fruit trees which have chiefly sprung up from seeds thrown out of and about houses, and have become common property of the inhabitants of a long house or village, are in no cases to be sold or in any way transferred or claimed by individuals leaving such houses or villages'.

'Any Dayak removing from a river or district may not claim, sell, or transfer any farming ground in such river or district, nor may he prevent others farming thereon, unless he holds such land under a grant';

(b) Rajah's Order No VIII, 1920 published 21 October 1922:

'22(1) Under this part lands may be occupied by Natives free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that where possible claims to fruit groves and farming lands shall be registered.

Records of such claims shall be kept by all Native Headmen and also in the Land Office in each district.

(ii) A certificate in the form of Schedule A of Notification No … of 1920 may be issued to registered land holders under this part'; and

(c) to complete the material at para 30(d) above:

(ii) A record of the names of those occupying land under this section shall be kept by all Tuah Kampong and also in the Land Office in each district.

(iii) A certificate in the form of Schedule A may be granted to each native land holder on application.

[36] Based upon these, it was submitted for the appellants that:

3.3.3 Pemakai Menoa is merely a territorial domain of a longhouse community which includes not only the farmed areas (temuda) but also those areas (NOT cultivated or occupied) where the natives go and take their jungle

or other resources from the forests near the cultivated areas (temuda). The Orders and proclamations made by the Rajahs and the statutes by the Council Negri, do not recognize the uncultivated areas or the forests which have not been felled for cultivation as having native customary rights. In other words, since before the arrival of the first Rajah Brooke (see Secretariat Circular No 12/1939) and thereafter, from the Orders and Proclamation made by the Rajahs or statutes passed by the Council Negri, no statutory recognition had ever been given to any custom pertaining to the creation or acquisition of native customary rights over Land covered by forests which have NOT been felled for cultivation or where they went (walking for up to half a day) in search for food, jungle resources or medicine.

3.3.4 Although native customs do not owe their existence to statutes, but reference to statutes is necessary to understand or to determine what are the customs that the 'laws of Sarawak recognize' and what customs have 'the force of law' to come within the definition of 'LAW' In the Federal Constitution. Any custom which is NOT recognized by the Laws of Sarawak or which does NOT have the force of Law cannot be taken into account in deciding whether the respondents had acquired or created Native Customary Rights over land. A court of law must decided a dispute based on the Law and the evidence adduced by the parties before the Court.

[37] Expanding upon this thesis, the learned state legal counsel proceeded with submissions on the Federal Constitution, distribution of legislative powers between the Federal Parliament and the State Legislative Assembly and the role of the courts. The following from his written submissions suffices:

4.4 Article 121 of the Federal Constitution provides, inter alia, that 'the High Courts and inferior courts shall have such jurisdiction as may be conferred by or under federal law'.

4.5 Under Article 121(1B)(b) the Court of Appeal shall, apart from its appellate jurisdiction to hear appeals from the High Court have 'such other jurisdiction as may be conferred by or under federal law'.

4.6 Under Items 2(a) & (b) of List II (State List) in the Ninth Schedule of the Federal Constitution and Item 13 of List IIA (Supplement to State List for Sabah and Sarawak), read with Articles 74(2) and 95B(l)(a) thereof, only the State Legislature of Sarawak can legislate on:

(a) Native Reservations and Land tenure; and

(b) Native law and customs including, inter alia, the determination of native law and customs.

4.7 Federal Parliament has no legislative authority over the above-mentioned subject-matters and therefore, could not have passed any federal laws to confer jurisdiction on the High Court: or Court: of Appeal, over native

laws and customs in Sarawak, including the determination thereof. Thus, the High Court: and the Court of Appeal and the Federal Court, hearing appeals from the High Court and Court of Appeal, could NOT have jurisdiction conferred by federal law to change or modify native customary laws of Sarawak. Such customary laws are part: of the laws of the Nation by virtue of the definition of 'Law' in Article 160 and the Courts have to uphold, apply and enforce such customary laws.

4.8 PW1 (Nicholas Bawin ak Anggat) was a former Deputy President of Majlis Adat Istiadat, Sarawak. Majlis Adat Istiadat, Sarawak ('Majlis Adat Istiadat') was incorporated under the Majlis Adat Istiadat Sarawak Ordinance, 1977 (passed by State Legislature) and amongst its functions, under Section 3(1)(c), is 'to recommend to the Majlis Mesyuarat Kerajaan Negeri on the deletion or abolition of any adat the practice whereof is, in the opinion of the Majlis, detrimental to the progress of any native community or if the adat is found to be inconsistent with any other State law'.

4.9 State law has, therefore, vested in the Majlis Adat Istiadat AND NOT THE COURTS the powers to express opinion whether any custom is detrimental to 'the progress of any native community'. If the Majlis has formed that opinion, it will make the recommendation to the MMKN (State Cabinet). Change to the adat may take place thereafter.

4.10 Thus, the Civil Courts are not empowered to change, modify or alter native customary law of Sarawak, and there is no allegation or suggestion that the custom of creating rights to land for farming is temuda ie land cleared from virgin jungle cultivated and occupied by natives, contravenes any provision of the State or Federal Constitution.

4.11 Further, the Native Courts in Sarawak are established to administer the native customary laws of the State and in the process, the Native Courts would determine and declare the native customs in respect of any particular issue as the Native Court: of Appeal, assisted by Native assessors, did in *Sumbang*'s case (supra) on the specific issue of the transferability of NCR land by a native. That custom like temuda when so found or determined by the Native Court is applied by or given judicial notice by or in the Civil Courts. There is no provision in the Federal Constitution or in the Courts of Judicature Act that empowers a civil court to overrule a decision of the Native Court of Appeal in Sarawak on native customary law and to substitute its own decision for that of the Native Court: of Appeal even if it wants to declare Pemakai Menoa as part: of the customary laws of the I bans for the creation of rights over land.

[38] Article 121 of the Federal Constitution provides that the jurisdictions of the Federal Court, Court of Appeal, the High Court and the inferior courts are determined by or under federal law. Article 74 provides the authorisation as to the matters upon which the Federal Parliament and the Legislature of a State

may make laws. These are set out in the Ninth Schedule. Article 95B provides for the additional matters for the Legislature of the States of Sabah and Sarawak.

[39] The State List at List II of the Ninth Schedule and The Supplement to State List for States of Sabah and Sarawak at List IIA in the same schedule sets out the matters solely within the legislative authority of the States of Sabah and Sarawak.

[40] Matters in respect of land tenure and native reservations are listed in List II of the Ninth Schedule. List IIA of the Ninth Schedule provides as follows in respect of native laws and customs:

> 13 Native law and custom, including the personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate or intestate; registration of adoptions under native law or custom; the determination of matters of native law or custom; the constitution, organization, and procedure of native courts (including the right of audience in such courts), and the jurisdiction and powers of such courts, which shall extend only to the matters included in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law.

[41] Legislative jurisdiction and judicial jurisdiction are however distinct and separate roles. Hence, List IIA Item 13 provides that even though the constitution, organisation, and procedure of native courts (including the right of audience in such courts), and the jurisdiction and powers of such courts are solely within the legislative jurisdiction of the States of Sabah and Sarawak, it extends only to the matters included in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law.

[42] We hold that there is no question that the laws passed by the Legislature of the State of Sarawak in relation to land, in particular native customary rights to land, native law and custom and determination of native law and custom, are matters solely within the legislative jurisdiction of the State of Sarawak. However, art 121 does not, as in the case of Shariah Courts, exclude judicial jurisdiction. The High Court below and this court do not assume to have the power to change, modify or alter the Native Customary Law of Sarawak; nor do we have any intention of doing so. We are only here to ascertain and to declare the native's customary right to land. And we have no doubt whatsoever that under the Federal Constitution and the law of Sarawak we have the power to do so.

[43] We return to the submission that the laws of Sarawak does not recognise *pulau* as a valid native customary right to land.

[44] The legislative and administrative orders referred to above may be summarised broadly as follows. The Rajah's Order of 1875 is to the effect that if in the future large clearing is made of old jungle and afterwards abandoned, anyone else may make use of such abandoned land as squatters. The Fruit Trees Order 1899 is to the effect that a person may claim and sell fruits and rattan only if he had planted and cultivated the same. The Land Order 1920 authorises natives to occupy land free of all charges for the cultivation of fruit trees, *padi*, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws, and where possible the claim shall be registered with native headmen and land office in the district. The Supplementary to Land Order 1920 envisaged the setting aside of native land reserves in which natives can be allocated each one lot of 3 acres. The Guidance of Officers in Interpreting Order No L-4 1928 sets out tests for recognising existence of custom that it must be general and inveterate, and is not unreasonable, not against morality and not against public policy. The Land Settlement Ordinance (Rajah Order L-7 of 1933) defined native customary rights to be land planted with more than 20 fruit trees per acre, land in continuous occupation or has been cultivated or built on within three years, burial grounds or shrines and rights of way. The Secretariat Circular of 1933 recognised right to clear land which then vests in the community and kept in cultivation in a cycle compatible with the maximum fertility of the land cultivated in expert native opinion, by methods within the reach of the community. The Secretarial Circular of 1939 enlarges upon the 1933 circular, recognised where not inconsistent with community ownership, individual ownership which may, subject to a say in the matter by the community, be transferred to others outside the community. The *Tusun Tunggu* disallowed selling, purchase or lease of native customary land, but allowed gift or inheritance, and if a native moves out he loses his right to the farmed land which reverts to Crown land. The Sarawak Land Code (Cap 81) then introduced provision by which native customary rights may be created, and that until title is issued it is deemed to be held under licence free of rent, and the question whether such right has been created or lost or terminated shall be determined by the law in force immediately prior to the 1st day of January 1958.

[45] More precisely, these laws set out what natives may claim under those laws. If there is nothing in the law that recognises the native customary rights to land, it is equally true there is nothing in clear and unambiguous language rejecting native customary rights to land. We found no assistance to the question in the particular facts before the court, in this appeal, that is the status of native customary rights acquired before the arrival of the Brookes who held sovereignty between 1841 and 1946, British rule and the State of Sarawak in Malaysia.

[46] As we have concluded earlier above, there is no reason to hold that the claim over the area of 2712 hectares, as *pulau*, is not bona fide. It was conceded that the respondents had valid native customary right to the 2802 hectare area adjoining it. It was acknowledged that although the Adat Iban Order 1993 did not mention the native custom of *pemakai menoa*, it did not mean the native custom did not exist.

[47] Unlike law imposed from above by coercive authority such as a king or a Legislature, native customary law develops from the ground as customs and practices evolve from and in response to changing circumstances and gain general acceptance. In a sense it is direct democracy. These native customary laws traversed a broad range of subjects of communal interest, as the later Adat Iban Order 1993 itself demonstrates. Not all but some of which relate to interest in land.

[48] Although in the Federal Constitution, 'State law' means:

(a) any existing law relating to a matter with respect to which the legislature of a state has power to make law, being a law continued in operation under Part XIII; and

(b) a law made by the Legislature of a state;

the definition of law under the Federal Constitution, that it 'includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof'; means that the common law nevertheless applies in the State of Sarawak.

[49] The respondents, as natives of Sarawak are no less Malaysian citizens, therefore entitled to the protections of their rights under the Federal Constitution as anyone else. The Court of Appeal in *Superintendent of Lands & Surveys & Ors v Nor ak Nyawai & Ors* endorsed the existence of native customary rights under common law:

> In respect of the other expositions of the law by the learned judge in relation to native customary rights we are inclined to endorse them. And briefly they are as follows:
>
> (a) that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;
>
> (b) that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished;
>
> (c) that the Sarawak Land Code 'does not abrogate whatever native

customary rights that exist before the passing of that legislation'. However natives are no longer able to claim new territory without a permit under s 10 of that legislation from the Superintendent of Lands & Surveys; and

(d) that although the natives may not hold any title to the land and may be termed licensees, such licence 'cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation'.

[50] That view was accepted by the Federal Court in *Superintendent of Lands & Surveys Miri v Madeli bin Salleh* [2007] MLJU 805; [2007] 6 CLJ 509 (FC), where Ariffin Zakaria FCJ (as he then was) held:

> The CA in *Superintendent of Lands & Surveys Bintulu & Ors v Nor ak Nyawai & Ors and Another Appeal* [2005] 3 CLJ 555 endorsed the view of the learned judge in relation to native customary rights in that the common law respects the pre-existence of rights under native laws and customs though such rights may be taken away by clear and unambiguous words in a legislation. By common law the Court of Appeal must be referring to the English Common Law as applicable to Sarawak by virtue of s 3(1)(c) of the Civil Law Act 1956.

[51] The common law recognition of pre-existing native customary law provides the basis of successful claims in *Mabo and Others v Queensland (No 2)* (1992) 175 CLR 1 HCA; [1992] HCA 23 and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), at pp 672–673.

[52] We are of the view that recognition of the pre-existing native customary rights of the respondents' ancestors to the land in their *pemakai menoa* is inherent, for although the Brookes assumed sovereignty in 1841, at no time were the natives conquered and their lands and properties confiscated in war. There is a clear distinction between assumption of sovereignty and title to land. The sovereign right to title within the state is not absolute but subject to unconfiscated pre-existing rights.

[53] Although the respondents in *Superintendent of Lands & Surveys & Ors v Nor ak Nyawai & Ors* failed in their claim, it was for failure to adduce evidence in support of their claim of native customary rights. The present appeal suffers no similar impairment.

[54] We conclude in the absence of clear and unambiguous words to repeal or reject pre-existing native customary rights established under pre-existing native custom, common law applicable in Sarawak recognises the native customary rights inherited by the respondents from their ancestors who

established the rights in the early 1800s over the 2712 hectare area set aside in their *pemakai menoa* under the native custom of *pulau*, and that right cannot be taken away without compensation.

[55] For these reasons, the appellants' appeal was dismissed with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar